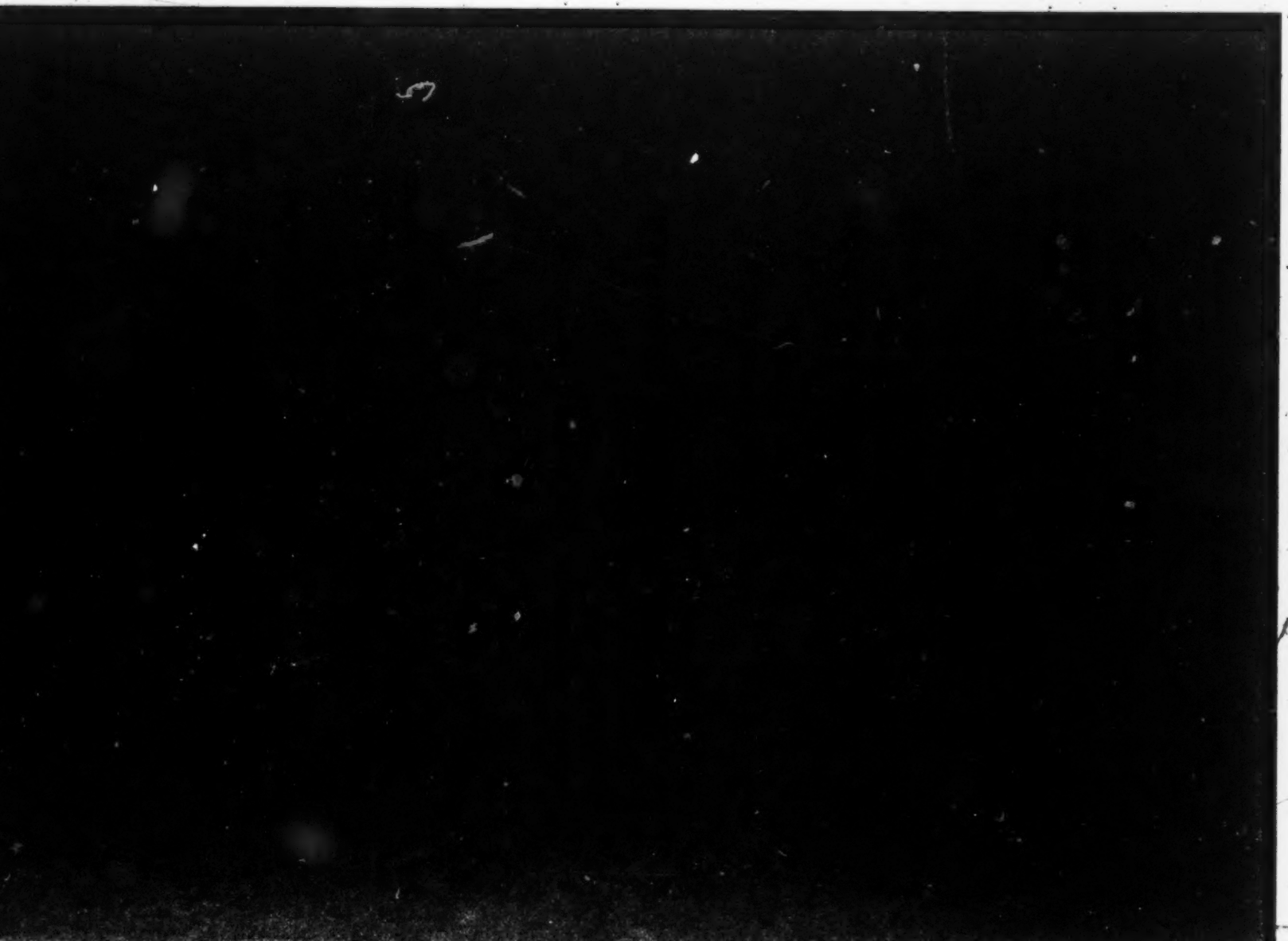

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IN THE

Supreme Court of the United States

October Term, 1966
No. .....

HARRY SCHACKMAN; JOSEPH GROSS; NATHAN DE-LUCA; HARRY PINCH; CHARLES GARY STRIEBY and JOSEPH RICHARD TOUART,

Petitioners,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, *et al.*,

Respondents.

WILLIAM PINKUS,

Petitioner,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, *et al.*,

MOTION TO DISMISS OR AFFIRM.

Appellees Roger Arnebergh, City Attorney for the City of Los Angeles; Evelle J. Younger, District Attorney for the County of Los Angeles; William H. Parker, Chief of Police of the City of Los Angeles; Peter J. Pitchess, Sheriff of the County of Los Angeles; Thomas C. Lynch, Attorney General of the State of California; Municipal Court of the Beverly Hills Judicial District, County of Los Angeles, State of Cali-

fornia; Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California; and Board of Police Commissioners of the City of Los Angeles, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal heretofore filed with this Honorable Court in each of the above entitled cases be dismissed, or, in the alternative, that the final judgment and decree of the District Court be affirmed in each such case on the grounds that:

(a) That the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to these rules.

(b) That it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement.

Appellants have jointly appealed from the final judgments and orders of the United States District Court, Central District of California, dismissing appellants' complaints on the ground they failed to state a claim against Appellees upon which relief could be granted and entered pursuant to motions for Summary Judgment and Motions to Dismiss (treated as Motions for Summary Judgment).

Appellant sought the empanelment of a three-judge court for a declaration that the films and magazines incorporated into their complaints by reference and

which were the subject matter of criminal prosecutions were not obscene as a matter of law, and that the enforcement, operation and execution of the California obscenity statute deprived them of their civil and constitutional rights as protected by the First (freedom of speech), Fourth (freedom from unreasonable search and seizure) and Fourteenth (equal protection of the laws) Amendments to the Constitution of the United States. Appellants further sought injunctive relief against Appellee courts, law enforcement agencies, and city, county and state officers to prohibit them from conducting such prosecutions, together with an order compelling such courts, agencies and persons to establish a pre-prosecution and pre-arrest censorship system to which Appellants could submit film and magazines for a determination of obscenity prior to exhibition or distribution.

Evidence consisting of the films and magazines referred to in said complaint, arrest reports covering the arrests of Appellants and detailed and comprehensive affidavits covering all stages of law enforcement procedures followed in prosecutions under Penal Code Section 311.2 and in the prosecutions of Appellants were submitted to the District Court. After consideration of the pleadings, the evidence submitted by the parties, and the arguments of the parties, the District Court made its decision, findings of fact and conclusions of law that Appellants' application for a three-judge court be denied on the grounds that the com-

plaint did not allege a basis for equitable relief, that no substantial federal question was presented requiring a three-judge court, and that the films and magazines incorporated in the complaint as exhibits were clearly obscene and pornographic in the hard core sense in that they came within the reasonable purview and ambit of both the federal judicial and California statutory definitions of obscenity and hard core pornography, so that the Court found no substantial federal question by way of a deprivation of any civil or constitutional right, whether protected by the Civil Rights Acts or the First, Fourth or Fourteenth Amendments to the Constitution of the United States.

The Court also found that appellees acted in good faith, without malice and in the lawful performance of their duties in the arrests and prosecutions of appellants; that appellees had reasonable cause to believe that the films and magazines were within the ambit and purview of California Penal Code Section 311.2; that as public officers, appellees were immune from suit under the Civil Rights Acts for conduct in performance of their duties in good faith; that no appellee entered into any conspiracy or scheme to enforce Penal Code Section 311.2 or any other law in any illegal, wrongful or arbitrary manner nor performed any wrongful act which proximately caused injury or damage to any appellant; that California statutes furnish standards and guide-lines for the arrest and prosecution of public offenses which procedures were fol-

lowed by appellees herein; that neither the Constitution nor law of the United States or the State of California require judicial determination of obscenity prior to the institution in good faith of a prosecution or arrest for violation of the state obscenity laws.

Questions Presented.

The questions presented on this appeal are:

1. Was the Court below required to empanel a three-judge Court?

2. Is any substantial question presented that:

(a) appellees conspired to enforce California Penal Code Section 311.2 in an illegal, wrongful and arbitrary manner so as to deprive appellants of due process, equal protection of the laws, freedom of speech or press, or freedom from unreasonable search and seizure?

(b) the Constitution or laws of the United States or of the State of California require a judicial determination of obscenity prior to the institution, in good faith, of a prosecution or arrest for violation of the state obscenity laws?

ARGUMENT.

The District Court Was Not Required to Convene a Three-Judge Court.

The decision of the District Court is plainly correct. Even though the constitutionality of a state statute is challenged in a suit for injunction, the convening of a three-judge court is not required and a single judge has power to dismiss the complaint for want of jurisdiction (*Ex parte Poresky* (1933), 290 U.S. 30, 78 L. Ed. 152, 54 S. Ct. 3); as where there is a lack of a substantial federal question warranting exercise of jurisdiction in a nondiversity case (*Swift & Co. v. Wickham* (1965), 382 U.S. 111, 15 L. Ed. 2d 194, 86 S. Ct. 258; *Bailey v. Patterson* (1962), 369 U.S. 31, 7 L. Ed. 2d 512, 82 S. Ct. 549) or a lack of equity jurisdiction (*Jacobs v. Tawes* (4 Cir. 1957), 250 Fed. 611; *Public Service Com. v. Wycoff* (1952), 344 U.S. 237, 73 S. Ct. 276, 97 L. Ed. 291), or failure to show that a full and adequate state remedy does not exist. (*Priceman v. Dewey* (1949 D.C. N.Y.), 81 F. Supp. 557; *Rosso v. Puerto Rico* (1964 D.C. Puerto Rico), 226 F. Supp. 688).

A lack of substantiality appears when the constitutional question is without merit (*Gate Film Club v. Pesce* (1964 D.C. N.Y.), 236 F. Supp. 828, Aff'd. (2 Cir.), 339 F. 2d 888, cert. den. 380 U.S. 944, 85 S. Ct. 1023, 13 L. Ed. 2d 963); or where its unsoundness so clearly results from previous decisions (*Moss v. Hornig* (2 Cir. 1963), 314 F. 2d 89; *Bailey v. Patterson*, 369

U.S. 31 (*supra*); *Turner v. Memphis* (1962), 369 U.S. 350, 7 L. Ed. 2d 762, 82 S. Ct. 805 (*California Water Service Co. v. City of Redding* (1938), 304 U.S. 252, 82 L. Ed. 1323, 58 S. Ct. 865; *Bell v. Waterfront Com.* (2 Cir. 1960), 279 F. 2d 853).

A three-judge court is required only where plaintiff attacks the constitutionality of the statute, and is not required where the attack is limited to the unconstitutional result reached; a three-judge court is not required where the statute is susceptible of a construction and application which does not violate the Federal Constitution and is only misconstrued or erroneously applied in an individual case, but a three-judge court is required where the statute is not susceptible of a construction which does not violate the Federal Constitution. (See Anno. 15 L. Ed. 2d 918; *Bartlett & Co. Grain v. State Corp. Com.* (1963 D.C. Kan.), 223 F. Supp. 975; *Phillips v. United States* (1941), 312 U.S. 246, 85 L. Ed. 800, 61 S. Ct. 480; *Evergreen Review Inc. v. Cahn* (D.C.N.Y. 1964), 230 F. Supp. 498).

Both the complaint and notice of appeal [R. 270] filed by Appellants indicate that their attack upon Penal Code Section 311.2 is predicated not upon the statute itself, but upon Appellees' allegedly illegal actions in enforcing such statute. The complaint alleges that the Appellees conspired to enforce the statute "in an illegal, wrongful and arbitrary manner" [R. 8] alleges that a controversy exists as to whether ". . . California

Penal Code Section 311.2 as applied, *pursuant to and as a result of the conspiracy of Respondents*" violates constitutional rights [R. 14] and prays that the Court declare, said Section 311.2 "as applied, pursuant to and as a result of the conspiracy of Respondents" violates the Constitution [R. 17].

No Substantial Question Was Presented as to Violations of Civil Rights or as to Rights, Privileges or Immuities Guaranteed by the Constitution or Laws of the United States or State of California.

Appellants action was without merit in that no violation of any of the provisions of the Civil Rights Act (42 U.S.C. 1981-1985, 1988) other statutes, or the Constitution of the United States was alleged or established. Federal rights statutes are not a basis for civil actions for damages against public officers acting in their official capacities in good faith and pursuant to state law (*Barr v. Matteo,* 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335; *Gregoire v. Biddle* (C.A. 2d 1949), 177 Fed. 579; *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L. Ed. 646).

Appellants, Roger Arnebergh, City Attorney for the City of Los Angeles, Evelle J. Younger, District Attorney for the County of Los Angeles, William H. Parker, Chief of Police of the City of Los Angeles, Peter J. Pitchess, Sheriff of the County of Los Angeles, and Thomas C. Lynch, Attorney General of the State of California, are each and all immune from suit under the Civil Rights Acts for conduct in the

performance of their official duties. (*Agnew v. Moody* (9 Cir. 1964), 330 F. 2d 868, 869, cert. den. 379 U.S. 867; *Rhodes v. Houston* (D.C. Neb. 1962), 202 F. Supp. 624, Aff'd 309 F. 2d 959, cert. den. 372 U.S. 909; *Rhodes v. Meyer* (8 Cir. 1964), 334 F. 2d 709, 718; *Puett v. City of Detroit* (6 Cir. 1963), 323 F. 2d 591; *Kenny v. Fox* (6 Cir. 1956), 232 F. 2d 288, cert. den. 325 U.S. 855, 1 L. Ed. 2d 66).

Neither the County of Los Angeles, the Municipal Courts nor the Board of Police Commissioners is a person within the meaning of the Civil Rights Act (*Monroe v. Pape,* 365 U.S. 167, 187, 188, 5 L. Ed. 2d 492, 505-507, 81 S. Ct. 473).

Only a case of manifest oppression will justify a federal court in enjoining public officials acting under color of authority in carrying out their duties under state law. (*Rhodes v. Houston* (*supra*), 202 F. Supp. 624; *NAACP v. Gallion,* 290 F. 2d 337, vacated on other grounds 368 U.S. 16, 7 L. Ed. 2d 85, 82 S. Ct. 4).

Federal Courts of Equity are loath to restrain criminal prosecutions by states, even on constitutional grounds, where all constitutional issues can be decided in the first instance as a matter of course by the state courts. (*Moss v. Hornig* (C.A. 2d 1963), 314 F. 2d 89, 91; *Stefanelli v. Minard,* 342 U.S. 117, 120, 96 L. Ed. 138, 72 S. Ct. 118 (1951); *Douglas v. City of Jeanette,* 319 U.S. 157, 163-164, 87 L. Ed. 1324, 63 S. Ct. 877 (1943)).

Unlike the complaint involved in *Dombrowski v. Pfister* (1965), 380 U.S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116, where it was alleged that the statutes on their face violated First and Fourteenth Amendment guarantees because overbreadth made them suspectible of sweeping and improper application, here no such claim is made; rather, this complaint is against an alleged conspiracy of Appellees to illegally arrest and prosecute under an otherwise valid statute. While it is not settled whether suits under the Civil Rights Acts come within the "expressly authorized" section of 42 U.S.C. §2283, the courts recognize "that federal interference with a State's good faith administration of its criminal laws is particularly inconsistent with our federal framework". (*Dombrowski v. Pfister* (*supra*), 380 U.S. at page 484).

The procedures afforded by California law for the enforcement of Penal Code Section 311.2 meet constitutional requirements of due process.

> "If the procedure prescribed by the State actually affords the character of due process contemplated by the federal Constitution, and is followed, there is no denial of the right under the federal constitution. While if it does not, or is not followed, the right has been violated. Smith v. State of Texas, 311 U.S. 128, 61 S. Ct. 114, 85 L.Ed. 84; Hill v. State of Texas, 316 U.S. 400, 62 S. Ct. 1159 86 L.Ed. 1559." (*Mueller v. Powell* (C.A. 8, 1953), 203 F. 2d 797, 800).

California laws relating to arrests and searches meet the fundamental criteria and standards required by the federal Courts in applying Constitutional standards. (*Ker v. California* (1963), 374 U.S. 31, 10 L. Ed. 2d 726, 83 S. Ct. 1623.) California law relating to the authority of a peace officer to arrest (Penal Code Section 836), time within which the arrested person must be presented to a magistrate (Penal Code Section 825), and complaint filed (Penal Code Section 849); the arrested person's right to bail (Penal Code Section 1272); his right to a speedy and public trial, counsel, witnesses on his behalf, confrontation of witnesses and cross-examination (Penal Code Section 686, Calif. Const. Art. 1 §13); his right to a jury trial in all criminal cases (California Const. Art. 1, §7); preference in setting for trial (Penal Code Section 1050); right to test the sufficiency of complaint by demurrer (Penal Code Section 1004), and his right to supress or secure return of evidence illegally seized (Penal Code Section 1539-1540) are set forth in pertinent text in the Appendix hereto. While denial of a motion to return, like denial of a motion to suppress is not reviewable on appeal, a discretionary review by writ of mandate is available (*People v. Gershenhorn,* 225 Cal. App. 2d 122, 124-126).

California obscenity statutes, as amended in 1961, are in accord with the constitutional requirements laid down and discussed in *Mishkin v. New York,* ..... U.S. ....., 86 S. Ct. 958, 16 L. Ed. 2d 56, and *A Book named John Cleland's Memoirs v. Attorney General,*

.... U.S. ...., 86 S. Ct. 975, 16 L. Ed. 2d 1. As stated in *Mishkin* at page 61, "The New York Courts have interpreted

> "obscenity in §1141 to cover only so called 'hard core pornography' See *People v. Richmond County News, Inc.*, 9 NY 2d 578, 586-587 . . . Since that definition of 'obscenity' is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below".

The same statement, but substituting Penal Code Section 311.2 and *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 for the statute and case cited, can be said of the California Courts and the constitutionality of its obscenity laws.

The California statute, by use of the word "knowingly" defined therein to mean "having knowledge that the matter is obscene" satisfies the constitutional requirement of scienter as pointed out in *Smith v. California* (1959), 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215. (*Mishkin v. New York* (*supra*), 16 L. Ed. 2d at pages 62, 63).

The control of obscenity by criminal prosecutions, under proper standards, is constitutional (*Alberts v. California*, 354 U.S. 476, 495, 1 L. Ed. 2d 1498, 1513, 77 S. Ct. 1304; *Kingsley Books v. Brown*, 354 U.S. 436, 440, 1 L. Ed. 2d 1469, 1473, 77 S. Ct. 1325). A state is not limited in the remedy it selects so long as due process is observed (*Kinglsey Books v. Brown* (*supra*), cited in part in *Times Film Corp. v. Chicago*

(1961), 365 U.S. 43, 50, 5 L. Ed. 2d 403, 408, 81 S. Ct. 391).

Neither the California statute nor the procedures provided by California law are so vague or standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and juries free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. (*Roth v. United States* (1957), 354 U.S. 476, 491, 1 L. Ed. 2d 1498, 1511, 77 S. Ct. 1304; *Kingsley Books v. Brown, supra,* 345 U.S. 436, 441).

No California Statute nor Any Requirement of the Constitution of the United States Requires a Judicial Determination of Obscenity as a Condition Precedent to the Institution in Good Faith of a Complaint and/or Arrest for Violation of the State Obscenity Laws.

The provisions of California statutes giving appellants the right to suppress or secure the return of evidence allegedly illegally seized (Penal Code Sections 1539-1540) and the availability of the Writ of Mandate (*People v. Gershenhorn, supra,* 225 Cal. App. 2d 122, 124-126) places the California procedure in a different constitutional light than the Missouri procedure condemned in *Marcus v. Search Warrant of Property, etc.* (1961), 267 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708. (*People v. Campise* (1966), 242 Cal. App. 2d .... (242 A.C.A. 713, App. Dept. Sup. Ct. San Diego)).

For the reasons stated, it is respectfully submitted that the appeal in each case should be dismissed, or in

the alternative, that the judgment and decree of the District Court in each case should be affirmed.

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APPENDIX A.

California Constitution.

Art. I §7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of 12, or of any number less than 12 upon which the parties may agree in open court. [Amendment adopted November 6, 1928.]

Art. I §13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; . . . [Constitution of 1849, Art I, Sec 8, revised 1879; amended November 6, 1934.]

California Penal Code.

§686. [Rights of defendant: Speedy and public trial: Counsel: Production and confrontal of witnesses: Exceptions.] In a criminal action the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, . . . [Enacted 1872; Am Stats. 1911, p. 364.]

§825. [Time within which defendant must be taken before magistrate: Attorney may visit prisoner: Refusal to permit visit a misdemeanor: Forfeiture for refusal and recovery thereof.] The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. . . . [Enacted 1872; Am. Code Amdts. 1880, p. 30; Stats. 1907, p. 888; Stats. 1927, p. 1044.]

§836. [Arrests by peace officers: Arrest under warrant or without warrant.] A peace officer may make an arrest in obedience to a warrant, or may without a warrant, arrest a person;

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed. [Enacted 1872; Am. Stats. 1957, ch. 2147, §2.]

§849. [Arrest without warrant: Person arrested to be taken before nearest magistrate: Complaint to be

laid: Right of peace officer to release person arrested from custody.] (a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate.

(b) . . . [Enacted 1872; Am. Stats. 1935, p. 874; Stats. 1957, Ch. 2147, §6.]

§1004. [Grounds for demurrer.] The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;

3. That more than one offense is charged, except as provided in Section 954;

4. That the facts stated do not constitute a public offense;

5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. [Enacted 1872; Am. Code Amdts. 1880, p. 18; Stats. 1905, p. 772; Stats. 1951, ch. 1674, §73.]

§1050. [When cases to be set for trial: Precedence of criminal cases: Continuances: Defendant's attorney member of Legislature: Length of continuance: Entry of facts in minutes: Dismissal under §1382.] The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. . . . [Added by Stats. 1927, p. 1036; Am. Stats. 1945, ch. 1512, §3; Effective July 18, 1945; Stats. 1959, Ch. 1693, §2.]

§1272. When admitted to bail after conviction and upon appeal. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail;.

1. As a matter of right, when the appeal is from a judgment imposing a fine only.

2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.

3. As a matter of discretion in all other cases. [Enacted 1872; Am. Stats. 1909, p. 591.]

§1539. Proceedings, if grounds of warrant are controverted: [Taking of depositions]. If the grounds on which the warrant was issued be controverted, he must

proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in section eight hundred and sixty-nine. [Enacted 1872.]

§1540. Property, when to be restored to person from whom it was taken. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken. [Enacted 1872.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SCHACKMAN ET AL. *v.* ARNEBERGH.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 1186. Decided May 29, 1967.

PER CURIAM.

Appellants seek review by this Court of the refusal by the District Court to convene a three-judge District Court pursuant to 28 U. S. C. §§ 2281–2284. We have held that such review is available in the Court of Appeals, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, and not in this Court. *Buchanan* v. *Rhodes*, 385 U. S. 3.

The motion to dismiss is granted and the appeal is dismissed for lack of jurisdiction.